



Comptroller General
of the United States

Washington, D.C. 20548

ms Williams

Decision

Matter of: Hospital Shared Services of Colorado, Inc.

File: B-236005.3

Date: December 22, 1989

DIGEST

1. Protest against termination of contract based on determination that awardee was ineligible to receive the award under a small business set-aside is denied where the awardee certified that it is a nonprofit organization and the applicable Small Business Administration regulations define a small business in terms of a business entity organized "for profit."
2. Protest that agency's failure to identify the awardee's ineligibility for award and to afford the awardee an opportunity to correct this alleged deficiency constitutes a lack of adequate discussions is denied since protester had constructive notice that its nonprofit status rendered it ineligible for award of a small business set-aside.
3. Where record shows that maintenance services were previously acquired through a small business set-aside and the contracting officer reasonably expected offers from at least two qualified small business concerns, there is no basis to conclude that the decision to set aside the current procurement was improper.
4. Allegation that decision to terminate contract resulted from improper congressional influence is denied where the record does not support the allegation.

DECISION

Hospital Shared Services of Colorado, Inc. (HSSC), protests the decision by the Department of the Army, Fort Carson, Colorado, to terminate the firm's contract awarded under request for proposals (RFP) No. DAKF06-88-R-0250, and the Army's proposed award to the remaining offeror in the competitive range.

We deny the protest.

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The RFP was issued on October 21, 1988, as a total small business set-aside for maintenance services at the Evans Army Community Hospital. Of the seventeen firms solicited, J&J Maintenance, Inc. and the protester--the incumbent contractor--were the only firms that submitted proposals. In its proposal, HSSC certified that it is both a small business concern and a nonprofit organization. J&J self-certified that it is a qualified small business concern. Both proposals were determined technically acceptable, discussions were held, and best and final offers were received and evaluated. HSSC was selected for award based on the contracting officer's determination that its proposal offered the best overall value to the government. On June 12, 1989, the contracting officer executed a written determination of urgency thereby waiving the requirements of Federal Acquisition Regulation (FAR) § 15.1001(b)(2) (FAC 84-13), which otherwise requires contracting officers to give unsuccessful offerors preaward notice of the apparent successful offeror under a small business set-aside, to permit timely filing of a size protest. Id.; 13 C.F.R. § 121.9 (1989). Award was made to HSSC on June 13.

On June 23, the contracting officer received a size protest from J&J challenging HSSC's self-certification as an eligible small business under the solicitation, as well as its certification as a nonprofit organization. The contracting officer referred the size protest to the Small Business Administration (SBA) by letter dated June 26, and on June 27 J&J protested the award to our Office.^{1/}

By letter dated June 30, the SBA declined to consider the merits of the size protest, stating that HSSC should not have been awarded the small business set-aside contract since HSSC certified itself as a nonprofit organization which is not a small business concern as defined by FAR § 19.001. J&J then filed a second protest with our Office on July 20 (B-236005.2), which we dismissed upon learning that the Army had terminated HSSC's contract for convenience on August 14 on the basis that the award had been improperly made to other than a small business concern, and further expressed its intention to award to J&J. Upon receiving notice of the August 14 termination of its contract and the agency's decision to make award to a qualified small business, HSSC filed the instant protest.

^{1/} This protest (B-236005), received in our Office on June 28, was dismissed on July 7 because the SBA, not our Office, has conclusive authority to review size protests.

HSSC contends that the termination of its contract was improper for several reasons. First, although the protester concedes that its nonprofit status renders it ineligible to receive award under a small business set-aside, the protester alleges that the contracting officer failed to hold meaningful discussions with the firm concerning this "deficiency," to its prejudice. Had it been so informed, HSSC states, it would have "readily" corrected this deficiency by substituting a "for profit" affiliate or subsidiary in place of the nonprofit organization. The protester explains that the firm, incorporated as a nonprofit entity due to its long association with a group of nonprofit hospitals, formed a "for profit" affiliate after submission of proposals for reasons independent of this small business issue, and that this "for profit" affiliate could have fully satisfied the agency's requirements. The protester asserts that our case law unequivocally permits a change of entity after receipt of proposals if the change is effected by operation of law, as in a corporate reorganization or sale of an entire business. See, for example, Numax Electronics, Inc., 54 Comp. Gen. 580 (1975), 75-1 CPD ¶ 21.

Next, HSSC argues that the contracting officer improperly restricted this procurement to small businesses since adequate small business competition was not obtained. The protester asserts that the contracting officer's decision to set aside the procurement was based in part on his mistaken belief that HSSC was one of two eligible small business concerns interested in competing for the contract. However, as subsequent events have established, only one qualified small business concern responded, allegedly resulting in inadequate competition. Finally, the protester complains that the decision to terminate its contract was tainted by improper congressional intervention and influence.

The decision by an agency to terminate a contract for convenience generally is a matter of contract administration that is not reviewed by our Office, but we will consider the reasonableness of such a termination where, as here, the agency determines that the initial award was improper and the contract should be terminated to permit a proper award. Electro Methods, Inc., 68 Comp. Gen. 235 (1989), 89-1 CPD ¶ 121. The scope of our review is limited to determining whether the initial award was improper and, if so, whether the corrective action is sufficient to protect the integrity of the competitive procurement system. Honeywell, Inc., B-231365.2, Dec. 2, 1988, 88-2 CPD ¶ 550. For the reasons set forth below, we agree with the agency that an improper

award was made to HSSC, and that termination and award to J&J, the sole remaining offeror, was appropriate.

Contracting officers are required to conduct discussions with all offerors in the competitive range. FAR § 15.610 (FAC 84-16). Discussions must be meaningful and this generally means that contracting officers must furnish information to all offerors as to areas in which their proposals are believed to be deficient so that offerors may have an opportunity to revise their proposals to fully satisfy the agency's requirements. See FAR § 15.610(c); The Maxima Corp., B-234019, Apr. 7, 1989, 89-1 CPD ¶ 363. However, the actual content and extent of discussions are matters of judgment primarily for determination by the agency involved and we will only review the agency's judgments to determine if they are reasonable. See Proprietary Software Systems, B-228395, Feb. 12, 1988, 88-1 CPD ¶ 143.

The Army concedes that in evaluating HSSC's proposal it failed to recognize that the firm's certification as a nonprofit organization rendered it ineligible for award as a small business concern. Nonetheless, we agree with the agency that it was not required to discuss this disqualification with HSSC since the SBA standards for qualification as a small business concern are published in the Code of Federal Regulations, and all parties, including HSSC, are on constructive notice of its provisions. National Civic League, B-228030, Aug. 14, 1987, 87-2 CPD ¶ 160.

HSSC's contention that the Army did not have a reasonable expectation that at least two eligible small businesses would compete for the procurement is not supported by the record. The FAR requires that if two or more responsible small business concerns show an interest in competing for the contract and the contracting officer can expect to receive reasonable prices, the procurement must be set-aside for exclusive small business participation. FAR § 19.502-2 (FAC 84-37); RBC, Inc., B-233589; B-233589.2, Mar. 28, 1989, 89-1 CPD ¶ 316. The FAR also provides that once services, such as those involved here, have been acquired successfully by a contracting office through a small business set-aside, all future requirements for that particular service shall be acquired on the basis of a repetitive set-aside. FAR § 19.501(g); RBC, Inc., B-233589, supra. From the record, it appears that in making his determination to continue the acquisition for these services as a small business set-aside, the contracting officer reasonably relied on the fact that the services had previously been acquired successfully through a small business set-aside. The contracting officer also reasonably expected that at least

two firms--J&J and HSSC, the then-incumbent contractor--were interested in competing for the current contract. While the record now shows that HSSC was eventually determined to be ineligible for award as a small business concern under the current solicitation, it also shows that other small businesses in addition to J&J and HSSC had expressed interest in the procurement.

The number of small business firms responding to a solicitation does not affect the propriety of the initial decision to set-aside the procurement. See Hopkinsville Aggregate Co., B-227830, June 16, 1987, 87-1 CPD ¶ 600. Rather, here the information available to the contracting officer at the time he made the decision to continue the procurement as a repetitive set-aside reasonably supported the conclusion that small business competition could be expected. See Litton Electron Devices, 66 Comp. Gen. 257 (1987), 87-1 CPD ¶ 164.

Finally, with regard to HSSC's allegation that congressional intervention improperly influenced the contracting officer's decision to terminate its contract, the agency has reported that it received and responded to one congressional inquiry concerning the status of the procurement. The agency states, and the record confirms, that the contracting officer's decision to terminate was based on the SBA's finding that HSSC as an ineligible firm that should not have received the initial award. Since HSSC has furnished no evidence to the contrary, we have no basis to consider HSSC's speculative allegation. See HLJ Management Group, Inc., B-225843.3, Oct. 20, 1988, 88-2 CPD ¶ 375.

The protest is denied.

for *James F. Hinchman*
James F. Hinchman
General Counsel